

Transcript of the Oral Argument to the United States  
Seventh Circuit Court of Appeals

September 7, 2018

Red Barn Motors vs. NextGear Capital



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EXHIBIT A

AUDIO RECORDING RE:  
RED BARN MOTORS VS. NEXTGEAR CAPITAL



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1 JUDGE WOOD: Yes. Continuing our third  
2 case for this morning is Red Barn Motors  
3 against NextGear Capital. Ms. DeLaney.

4 MS. DELANEY: May it please The Court.  
5 Kathleen DeLaney for Plaintiff appellants,  
6 Red Barn Motors.

7 NextGear charged about 20,000 used  
8 car dealers interest and fees on funds  
9 that had not been advanced. The central  
10 issue here is whether the take it or leave  
11 it form contract signed by all of these  
12 dealers allowed NextGear to charge  
13 premature interest and fees. NextGear  
14 argues, yes, in all instances. And Red  
15 Barn argues, no, in all instances. Nobody  
16 is arguing that any extrinsic evidence  
17 would generate different contract  
18 interpretations for individual dealers.  
19 NextGear created this problem by drafting  
20 an ambiguous contract, which should be  
21 construed against the drafter.

22 JUDGE ROVNER: Now, you point to cases  
23 that established the claims involving  
24 breach of form contracts could be resolved  
25 on a classwide basis even when ambiguities



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1 are involved. But the question here isn't  
2 whether The Court could have allowed the  
3 case. It seems to me that the question is  
4 whether The Court could not have  
5 disallowed the class. Is there any case  
6 you have holding that The Court could not  
7 deny class status when a contract was  
8 ambiguous?

9 MS. DELANEY: The cases that bear on this  
10 issue are ones that talk about the fact  
11 that form contracts are well suited for  
12 class treatment, and which is what our  
13 case is. And Judge Pratt did certify this  
14 case as a class action, with the --

15 JUDGE ROVNER: Right, but that's not an  
16 answer to the question.

17 MS. DELANEY: I'm not sure I have an  
18 answer to a double negative case.

19 JUDGE ROVNER: Well, all right, is there  
20 any case holding that The Court couldn't  
21 deny class status where a contract is  
22 ambiguous? Surely you understand my --

23 MS. DELANEY: I don't think there's an  
24 automatic bright line that if there's a  
25 form contract, then it's automatically

1 class certified or vice versa.

2 JUDGE ROVNER: So could I maybe phrase  
3 it -- break it down a little bit. Um --  
4 this contract is allegedly ambiguous about  
5 whether the interest can start running the  
6 date when the car is delivered to the used  
7 car dealers after the auction, or whether  
8 interest can start running only at the  
9 time NextGear advances the moneys. That,  
10 as I understand it, is the issue in  
11 what -- what does the contract say.

12 I also understand the district court  
13 judge to have said, actually in both  
14 stages, that the extrinsic evidence that  
15 had been proffered was not useful, that  
16 this was a, a construe the contract within  
17 its four corners situation. Doesn't  
18 necessarily always have to be that way,  
19 but she thought this contract was that.  
20 So that's kind of part one, you know,  
21 whether that's where we are, and the  
22 question about whether this is an  
23 ambiguous contract, because there are  
24 plenty of ambiguous contracts where  
25 extrinsic evidence of the negotiating



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1 process isn't terribly useful. You've  
2 argued there's an integration clause here.  
3 There are other instances where there  
4 doesn't happen to be any extrinsic  
5 evidence, and then you just resort to  
6 presumptions. You do the best you can.

7 The other thing is, um, how the  
8 district court handled the  
9 decertification. So it's one thing to say  
10 the district court has discretion to  
11 certify the class or not to certify the  
12 class or to revisit certification and  
13 decertify. It's another thing to say,  
14 does the district judge have a procedural  
15 obligation both at the certification stage  
16 and at the decertification stage, to go  
17 through the criteria of 23(a) and  
18 23(b)(3), and explain what's the problem,  
19 you know, why are we decertifying. And I  
20 understood you to be arguing that that  
21 procedural step, ah, at the second  
22 decision, the decertification decision,  
23 was not undertaken.

24 MS. DELANEY: That's correct. The first  
25 order, where the class was certified, did

1 march through all the requirements and  
2 some 14 pages of analysis. The  
3 decertification order, about 6 months  
4 later, spent about two sentences on the --  
5 JUDGE ROVNER: So, maybe that's why we're  
6 guessing about the extrinsic evidence,  
7 because we don't have that kind of  
8 analysis from the district court  
9 explaining what exactly is missing, what  
10 exactly would be different for all 20,000  
11 minus 12, or whatever it is, dealers.  
12 What -- that kind of explanation would  
13 allow us to get our hands around whether  
14 there was an abuse of discretion or not.  
15 MS. DELANEY: But the district court did  
16 make factual findings that go to the heart  
17 of this issue, stating that the Plaintiffs  
18 were unaware of when NextGear paid the  
19 auctions on their behalf. And NextGear's  
20 account executives were also unaware when  
21 NextGear paid the auctions. So they were  
22 unable to inform the Plaintiffs or other  
23 clients when the auctions were paid.  
24 JUDGE ROVNER: So I'm trying to figure out  
25 how you want to use that evidence, because

1 I saw that, and I thought you were using  
2 that to show that, at least at this stage,  
3 um, any kind of course of dealing argument  
4 would be difficult to make; and that I  
5 thought you were also relying on the  
6 contract to say that changes stemming from  
7 later developments, whether course of  
8 dealing, whether later conversations,  
9 couldn't be, ah, embodied in the contract  
10 until there was a writing anyhow.

11 MS. DELANEY: Correct on both counts. But  
12 the fundamental point here is that all the  
13 different types of extrinsic evidence that  
14 NextGear is pointing to and arguing  
15 require individualized analysis, all of  
16 those result in class-wide treatment.

17 They lend itself to class-wide treatment,  
18 because the account representatives didn't  
19 know that the interest was being charged  
20 prematurely. Therefore, what they told

21 our clients is of no moment, because they  
22 didn't know the answer themselves. The --

23 JUDGE ROVNER: Well, suggest that the  
24 reasonable inference, that wasn't even a  
25 topic if they didn't know about it.



1 MS. DELANEY: Well, but all of that  
2 happened after contract formation, as  
3 well. And the contract also has a no  
4 modification or waiver provision that says  
5 it can't be changed after the fact without  
6 a writing signed by both parties. And  
7 that didn't happen here either.

8 Same issue with the account  
9 statements and the web information that's  
10 available across the class. None of that  
11 revealed the answer to this question of  
12 when did the interest start being charged.

13 JUDGE BRENNAN: Help us understand, then,  
14 what requests -- what relief you're  
15 requesting.

16 MS. DELANEY: We're requesting --

17 JUDGE BRENNAN: Do you want reversal, with  
18 regard to the certification?

19 MS. DELANEY: Correct.

20 JUDGE BRENNAN: You -- the last resort  
21 case law, there's a lot of discussion  
22 about when we get into contra proferentem.  
23 We get to contra proferentem, you're  
24 asking that to happen now or on remand?

25 MS. DELANEY: Either way. I mean, our



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1 primary goal here is to get our class  
2 reinstated and get the case remanded for  
3 trial on the breach of contract claims.

4 JUDGE WOOD: So it's a 23(f) appeal, of  
5 course?

6 MS. DELANEY: Exactly.

7 JUDGE WOOD: That's all that's really  
8 here.

9 JUDGE ROVNER: Now, of course, the  
10 district court, in considering the summary  
11 judgment motion stated that the parties  
12 had evidences to conversations between  
13 various party representatives about  
14 NextGear's interest practices, but that  
15 the evidence was not undisputed and, ah,  
16 would require trial. Isn't that the type  
17 of extrinsic evidence that would support  
18 The Court's decertification of the class?

19 MS. DELANEY: Your Honor, I disagree,  
20 because all of the categories of extrinsic  
21 evidence that have been pointed to apply  
22 equally across the class. And NextGear is  
23 not arguing that anything that one  
24 particular account representative told one  
25 particular class member would result in a

1 different interpretation of the contract  
2 for that particular class member. They're  
3 asking that, uniformly across the class,  
4 the contract be interpreted to authorize  
5 them to prematurely charge interest. We  
6 believe the contract does not allow them  
7 to do that.

8 JUDGE ROVNER: Would I be wrong if I  
9 thought that the integration clause of the  
10 contract addresses only the modification  
11 or amendment of the contract?

12 MS. DELANEY: That would be incorrect.  
13 It's a broader provision than that. And  
14 it basically says I can -- I can -- it's  
15 cited in our brief, and I have it here  
16 somewhere.

17 JUDGE ROVNER: It's one of those that said  
18 nothing that's been said before this  
19 contract was entered into --

20 MS. DELANEY: Right.

21 JUDGE ROVNER: -- can vary or change the  
22 terms of the contract.

23 MS. DELANEY: The deal is the deal, and  
24 the deal is in the four corners of the  
25 document. And then there's another

1 provision that says it can't be modified  
2 on a going-forward basis without a writing  
3 reduced to both parties.

4 Um, the other important point to note  
5 here is that this is a take it or leave it  
6 contract. The company's representative  
7 testified in less than one-half of one  
8 percent of cases was there any  
9 consideration of negotiation on a  
10 one-on-one basis.

11 JUDGE BRENNAN: Can you put a number on  
12 that? Then are we talking about --

13 MS. DELANEY: He said fewer than 10 out of  
14 20,000.

15 JUDGE BRENNAN: Thank you.

16 MS. DELANEY: The general counsel of the  
17 company described the contract as "kind of  
18 like a credit card application or a credit  
19 card agreement." This is exactly -- it's  
20 as if NextGear is giving credit cards to  
21 our used car dealer clients that they can  
22 only use at auction, and then they're  
23 charging them interest on cash advances  
24 when the advances haven't even happened  
25 yet. So that's what's happening here.

1 And it happened across the class.

2 Irrespective of when they signed their  
3 contract, they all signed the same  
4 contract. It was in use for a number of  
5 years, until 2013. They changed the  
6 language to address this problem.

7 JUDGE WOOD: Well, they moved arbitration,  
8 didn't they?

9 MS. DELANEY: They changed the contract  
10 on -- on multiple levels in order to avoid  
11 the problem. But they created the  
12 ambiguity in a form contract. They  
13 provided information that was opaque, both  
14 to their own employees and to their  
15 customers, about when the interest and  
16 other fees would begin to be charged. And  
17 we think this case is just like the  
18 Suchanek case and the Newman case, and the  
19 ambiguities in take or leave it contracts  
20 ought to -- they do meet Rule 23's  
21 commonality and predominance requirements,  
22 and they can be resolved by looking at the  
23 Defendant's uniform conduct across the  
24 class.

25 Additionally, we reiterate the point

1 that ambiguities in form contracts should  
2 be construed against the drafter,  
3 NextGear, who created the problem.

4 JUDGE WOOD: Do you need that -- I mean,  
5 Indiana seems more open to extrinsic  
6 evidence, ah, than you're suggesting, but  
7 it also seems, ah, to lean to the position  
8 that the contra proferentem principle is  
9 really a last resort. You try other form.  
10 You try exclusio unius. You try, you  
11 know, whatever other canons of the  
12 construction you like to have. So I don't  
13 know whether we've boiled down to that  
14 point here or whether you're asking us to  
15 insert it too soon.

16 MS. DELANEY: At this point, we really are  
17 at the last resort. We were about 6 weeks  
18 away from trial at the time that the class  
19 was decertified. Discovery had closed.  
20 We were ready to try the case.

21 JUDGE WOOD: Let's emphasize that. So no  
22 other evidence was going to come into this  
23 record?

24 MS. DELANEY: Exactly. And as the  
25 district court found, as a fact finding

1 that's on an abuse of discretion standard,  
2 there was no helpful evidence on that  
3 point, because NextGear didn't tell its  
4 account executives and didn't tell its  
5 customers when they started lending the  
6 money. So, you know, they like to argue  
7 that, after the fact, some of our clients  
8 learned about this timing issue. But they  
9 learned that they were being overcharged  
10 after they had already signed a contract  
11 that they were stuck with. And none of  
12 that bears on the meaning of the contract  
13 that was signed in the first place.

14 I'd like to reserve the balance of my  
15 time, please.

16 JUDGE WOOD: Okay, that's fine.

17 Mr. Byrne. Take your time.

18 MR. BYRNE: Thank you, Your Honor. May it  
19 please The Court. Let me begin a little  
20 bit of context here. The practice that's  
21 being complained of is as conventional as  
22 it could be. The idea is this: When a  
23 lender extends a binding commitment of  
24 credit, they're entitled to be paid.

25 JUDGE WOOD: But they haven't extended the

1 credit. I mean, interest is typically a  
2 price for the use of money. And the money  
3 isn't being used until it's been extended.  
4 I presume that, um, NextGear has its money  
5 in income-earning accounts, and the money  
6 is happily earning income until it's  
7 removed from those accounts and sent over  
8 to the auction house.

9 MR. BYRNE: Well, Your Honor, I beg to  
10 differ on the point. But when a binding  
11 commitment --

12 JUDGE WOOD: You don't put your money in  
13 an income-generating account?

14 MR. BYRNE: Well, there's no evidence of  
15 that particular practice in the record  
16 here.

17 JUDGE WOOD: I'm just saying, any business  
18 I can think of would do that.

19 MR. BYRNE: Well, any business you can  
20 think of that lends money, though, Your  
21 Honor, would also charge you a fee upon  
22 the commitment for binding credit.

23 JUDGE WOOD: But that's not what you're  
24 doing. You're charging interest.

25 MR. BYRNE: Well, just --



1 JUDGE WOOD: Let me ask you this  
2 question --

3 MR. BYRNE: -- fee for lending.

4 JUDGE WOOD: No. No. No. I mean,  
5 sometimes there are origination fees, you  
6 know, \$100 for origination fee, and the  
7 interest is going to be 3 percent once the  
8 money is loaned. Um, let me ask you this:  
9 Is it your position that of these 20,000  
10 different agreements, 7,000 of them, once  
11 we look at all of the evidence, are going  
12 to turn out to be agreements in which it's  
13 okay to charge the interest from the date  
14 of the auction, and 13,000 of them are  
15 going to turn out to be agreements when  
16 it's not okay to charge interest from the  
17 date of the auction?

18 MR. BYRNE: Your Honor, that's not our  
19 position about the text of the agreements.

20 JUDGE WOOD: Well, so, um, this is why --  
21 my reason for asking that is: Unless  
22 you're willing to concede that this  
23 particular provision is going to vary  
24 agreement by agreement, I don't know why  
25 this issue isn't suitable for class

1 treatment. Because if your position is  
2 that that feature, at least, is common to  
3 the full class, you could have an issue  
4 class.

5 MR. BYRNE: Well, Your Honor, an issue  
6 class hasn't been requested. Let's put  
7 that aside for a second. Now, here --

8 JUDGE WOOD: But it'd the same as, I mean,  
9 as they argue very similar to Suchanek  
10 class. It really is. All class actions,  
11 in the end, have an individualized stage  
12 when relief is granted. Maybe some used  
13 car dealers only have a few cars, and  
14 maybe some have very large lots. So  
15 amounts are gonna differ. There are a lot  
16 of things. Period of time might differ.  
17 But whether this was a legitimate clause  
18 in the contract, you just told me it's  
19 going to be the same across all 20,000  
20 contracts.

21 MR. BYRNE: Well, Your Honor, that clause  
22 just begins to tell the story. These are  
23 ongoing commercial relationships. Let's  
24 consider the testimony we had from two of  
25 the three class representatives. They

1 both admitted that they knew that they  
2 were being charged interest upon the time  
3 of the purchase of the vehicle. They  
4 drove the --

5 JUDGE WOOD: But they didn't say they knew  
6 as of the time -- first of all, whether  
7 that's a permissible practice, when  
8 they've been -- when they're already bound  
9 by the contract, you know, you're telling  
10 me something that's different, sort of  
11 apples and oranges, you know. What does  
12 the contract say, and is the interest  
13 being charged? This is a state law claim,  
14 right? This is just diversity  
15 jurisdiction.

16 MR. BYRNE: State law breach of contract  
17 claim, Your Honor.

18 JUDGE WOOD: Yes, it's a state law breach  
19 of contract claim. So when they said  
20 we'll charge you interest on advances, is  
21 this an advance? It's a very  
22 straightforward question.

23 MR. BYRNE: Well, Your Honor, it could be  
24 seen that way under the contract. Our  
25 position in the district court was the

1 contract wasn't ambiguous, that we were  
2 entitled to do this. But the district  
3 judge found that the contract was  
4 ambiguous. She wanted to hear more,  
5 because she heard evidence -- there was  
6 evidence of these conversations showing  
7 the course of performance of the parties.

8 JUDGE WOOD: But the thing is, could  
9 course of performance vary? And also, are  
10 you going to stand up there in the  
11 district court -- or were you planning on  
12 standing up there in the district court  
13 and saying, an advance under some of our  
14 contracts starts the day the money is sent  
15 over to the auction house, but an advance  
16 in some of our other contracts, depending  
17 on what we've been doing with the dealer  
18 or what we said during the negotiations,  
19 can start on the day of the sale; was that  
20 going to be what you were going to say?

21 MR. BYRNE: No, Your Honor, that was not  
22 our position.

23 JUDGE WOOD: No!

24 MR. BYRNE: The text of the agreement is  
25 the text. But the text just begins to

1 tell the story if it's going to be told  
2 fairly.

3 JUDGE WOOD: Why does it, if there is an  
4 integration clause and a clause that says,  
5 no changes except in writing?

6 MR. BYRNE: Well, there isn't an  
7 integration clause, for the first thing,  
8 Your Honor. There's a clause called an  
9 integration clause --

10 JUDGE WOOD: Oh, for Heaven's sake.

11 MR. BYRNE: -- but if you read the  
12 language, it's simply an anti-modification  
13 clause. The doctrine of waiver, that  
14 there is an anti-waiver provision, a  
15 separate one in the agreement, but it  
16 applies only to the lender, not -- it  
17 doesn't go both ways. So you could have a  
18 waiver of breach here. And in fact, the  
19 evidence, the actual evidence that the  
20 district judge looked at with respect --

21 JUDGE WOOD: I can't tell what evidence  
22 she looked at. I mean, that's my  
23 procedural problem with this. You may be  
24 right about a lot of the substance, but  
25 her failure, when she decertifies, to

1 explain exactly which elements have  
2 persuaded her, that this is no longer  
3 suitable for class treatment, um, leaves  
4 me at something of a loss, to know how  
5 even to evaluate what she did.

6 MR. BYRNE: Well, Your Honor, there's 50  
7 pages of orders here from the district  
8 judge just on these last two issues.

9 THE COURT: No. No. No. But it's not a  
10 50-page decertification decision. She  
11 just whips through that pretty quickly.

12 MR. BYRNE: Well, Your Honor, the standard  
13 of review, of course, is abuse of  
14 discretion.

15 THE COURT: Exactly. But even under an  
16 abuse of discretion, this Court has  
17 procedural requirements for the district  
18 judges that you can't just sort of say,  
19 yes, you know, thumbs up, thumbs down.  
20 And you still have to affirm me on the  
21 abuse of discretion standard.

22 MR. BYRNE: Your Honor, with due respect  
23 to Judge Pratt, she did more than thumbs  
24 up, thumbs down. This is a single breach  
25 of contract claim. Only, there are two

1 state laws applicable, mostly Indiana,  
2 mostly the same. It's not one of those  
3 abuse of discretion cases where the  
4 district judge faces multi-state law  
5 applicability, lots of elements of  
6 different claims. In those cases, abuse  
7 of discretion because of inadequacy of the  
8 writing of the order has sometimes been  
9 found. This is a simpler determination  
10 based on the discussion the district judge  
11 authored.

12 JUDGE WOOD: It's on page 8. And it  
13 really -- it just zips right through. I  
14 mean, I don't know what she's looking at.  
15 She has a little reference to patent  
16 ambiguity, then suddenly says they're  
17 ambiguous, extrinsic evidence, not  
18 appropriate, boom, you know. I don't know  
19 what she thinks the extrinsic evidence is.  
20 I don't know what issues she thinks it  
21 pertains to. Is it commonality; is it  
22 typicality; is it predominance; is it  
23 superiority, given your concession that  
24 the contract is the contract; why is it  
25 relevant? I don't see anything.

1 MR. BYRNE: She says that there's an  
2 absence of predominance and commonality.

3 JUDGE WOOD: I don't understand why. I  
4 see undermines. She says the elements of  
5 commonality and predominance, but I don't  
6 understand how, given your position that  
7 the contract is actually the same contract  
8 for everybody.

9 MR. BYRNE: Because on the breach of  
10 contract claim, Your Honor, common issues  
11 do not predominate, because the contract  
12 itself in this ongoing business  
13 relationship lasts years. There's regular  
14 contacts with account representatives.

15 JUDGE WOOD: So there's some people, after  
16 the fact, for whom you cannot charge  
17 interest from the date of the sale; and  
18 there are other people post contract that  
19 you can charge interest post sale; is that  
20 your position?

21 MR. BYRNE: Your Honor, uh, that could  
22 well happen. Here's how the -- listen,  
23 the testimony of the --

24 JUDGE WOOD: I'm surprised.

25 MR. BYRNE: The testimony of the two class



1 representatives about their ongoing  
2 performance really matters. They asked  
3 about -- one of them asked about the very  
4 issue that's in front of us, and was told,  
5 no, the interest is charged from the date  
6 of sale. So the remarks about no one  
7 knowing the date of the sale are wrong.  
8 That's a different topic entirely. That  
9 doesn't mean that an account  
10 representative sitting on the showroom  
11 floor talking with a dealer can say this  
12 unit was paid, the auction was paid on  
13 such and such a date. Doesn't have that,  
14 of course, but he knows when interest  
15 begins to be charged. Now, because for  
16 one thing, it's an industry standard  
17 practice. We say the contract permits it,  
18 and it's completely fair, given that an  
19 extension of credit has been made.

20 That --

21 JUDGE WOOD: Those are merits arguments.  
22 I don't know that that's helping me much  
23 understand why this isn't, across the  
24 board, an issue for every one of these  
25 contracts.

1 MR. BYRNE: Your Honor, with due  
2 respect --

3 JUDGE ROVNER: Specifically, what evidence  
4 was presented to the district court in the  
5 summary judgment motions that would be  
6 relevant to the interpretation of the  
7 ambiguous contract -- of it being  
8 ambiguous, actually, which I know -- you  
9 haven't brought that before us, because  
10 you both agreed here that it's ambiguous,  
11 or at what evidence would be relevant to  
12 the defenses of waiver, ratification,  
13 modification and a stop order.

14 MR. BYRNE: Your Honor, as to the class --  
15 let's take the class representatives'  
16 evidence. That's what we have before us.  
17 This was a decision on whether to continue  
18 to certify the class. Two of the three  
19 class representatives admitted that they  
20 knew there was this timing difference that  
21 is the basis for the claim of breach of  
22 contract; yet, they continued to borrow.  
23 They were okay with that. And we all know  
24 from basic contracts, that one of the best  
25 ways in figuring out a contract

1 interpretation question is how the parties  
2 perform the contract. And that would be  
3 relevant to every one of these 27,000 used  
4 car dealers.

5 And to certify the class would be  
6 grossly unfair to the Defendant, because  
7 only part of the story could be told in a  
8 class action trial. The Defendant would  
9 have its arms tied behind its back.

10 That's why it's important to be able to  
11 tell the whole story on the breach of  
12 contract claim. It only begins with that  
13 form contract. It doesn't end with it.  
14 That's only the beginning of the  
15 relationship that went on for extended  
16 period of time.

17 JUDGE BRENNAN: But was that the reasoning  
18 that the district court was giving?  
19 That's what's opaque to us, is how to get  
20 to that.

21 MR. BYRNE: She alluded to -- these two  
22 orders are linked, Your Honor. That makes  
23 it a little bit of a slight accessibility  
24 problem in figuring out that very point.  
25 But she alluded to the evidence of

1 conversations by both sides and concluded  
2 that she wanted to hear more at trial  
3 about that, but that this case couldn't  
4 proceed on a class action basis. The  
5 question before The Court, in a  
6 deferential standard of review, is that  
7 given the record, given the context, was  
8 that decision within the broad range of  
9 discretionary decisions the district judge  
10 might have made. I don't believe that on,  
11 even on a deferential standard, The Court  
12 wants to get into wordsmithing the  
13 district court's opinion, so long as the  
14 record supports it and the district  
15 court's deliberative process is apparent  
16 from the order.

17 JUDGE WOOD: That's the problem, though,  
18 the last thing that you touched on. The  
19 district court's deliberative process is  
20 not apparent from the order, because we  
21 don't know which -- I mean, you have your  
22 theory about which of the extrinsic  
23 evidence may have been particularly  
24 persuasive and which issues it might have  
25 gone to. We don't know whether she agreed

1 with you, whether she had some other  
2 theory, whether that theory is a sound  
3 one, because she never spells it out.

4 MR. BYRNE: Well, Your Honor, I would say,  
5 with due respect, it seemed that she  
6 agreed with us, because she decertified  
7 the class. And there's enough --

8 JUDGE WOOD: We don't know why she did,  
9 though.

10 MR. BYRNE: Well, she found no commonality  
11 and predominance. She cited the Averitt  
12 case from the Eighth Circuit, which is  
13 right on point, another case involving a  
14 breach of contract claim, a classic breach  
15 of contract claim, with an ambiguity, two  
16 different interpretations, communications  
17 between the sales representatives and the  
18 plaintiffs. And for the Eighth Circuit --

19 JUDGE WOOD: But you keep talking about an  
20 ambiguity; and, yet you, your view, of  
21 course, is this contract is not ambiguous  
22 at all; that it allows your client to  
23 begin to charge interest from the day of  
24 the sale, even though no moneys have been  
25 advanced, and it uses the word "advanced,"

1 until some later date, you know, sometimes  
2 it's maybe when title passes; maybe  
3 sometimes it's some other date. But your  
4 view is that that initial sale is the  
5 date, and that the word "advanced" in the  
6 contract doesn't mean moneys advanced. It  
7 just means sale somehow, you know, or some  
8 other word. So I don't know what's  
9 ambiguous about that. I think that's what  
10 they think it means, too. And the  
11 question is: Is your practice of  
12 collecting the money one which is not  
13 authorized by the contract?

14 MR. BYRNE: Well, that's the ultimate  
15 question, Your Honor. This is, of course,  
16 the 23(f) appeal. So we're only here on  
17 whether or not the class should be  
18 certified.

19 JUDGE WOOD: And that's why we need -- you  
20 know, look, I sort of think sauce for the  
21 goose, sauce for the gander. The Supreme  
22 Court emphasized in the Walmart case, in  
23 particular coming to my mind, that  
24 district courts do have a job at the class  
25 certification stage. They've got to

1 resolve facts about predominance and about  
2 commonality. They sometimes need to have  
3 Daubert hearings, which doesn't happen to  
4 be this case, but it happens with some  
5 regularity. They've got to take a deeper  
6 dive into this than had been thought the  
7 case prior to Walmart. So, okay, the  
8 district judges are largely doing that.

9 And what doesn't happen here is that  
10 same care with explaining and resolving  
11 facts at the decertification stage.  
12 Certainly within her power, no question  
13 about that. Rule 23, she correctly says,  
14 allows her to revisit this. I wouldn't  
15 question that for a minute, but we don't  
16 know why she did it.

17 MR. BYRNE: Well, Your Honor, we would  
18 respectfully hope The Court, on  
19 reflection, can look at the whole body of  
20 the district court's work here since the  
21 beginning of this case in 2013. We submit  
22 it would be a waste of judicial resources  
23 now just to remand, for the district judge  
24 to add a few sentences to an order that is  
25 otherwise sound.

1 I will make one final point to  
2 respond before my time expires. The point  
3 made by the district judge that the  
4 evidence was not useful, the extrinsic  
5 evidence was not useful, is only  
6 addressing the point of whether or not it  
7 was the basis for summary judgment, which  
8 she said it was not, because it's  
9 disputed. The evidence was not  
10 non-existent. It was simply disputed. So  
11 we would ask that The Court affirm the  
12 order.

13 JUDGE WOOD: Okay. Thank you very much.

14 Ms. DeLaney.

15 MS. DELANEY: Thank you. I'd like to  
16 begin by answering the question that I  
17 misunderstood from Judge Rovner early on.  
18 We cited a case on page 8 of our reply  
19 brief, Smilow versus Southwestern Bell, a  
20 First Circuit case where the First Circuit  
21 reversed a district court's  
22 decertification of a class that had  
23 previously been certified. That was  
24 involving cell phone consumer contracts.  
25 I'm sorry I didn't understand you at



1 first, but I hope that helps.

2 In terms of the analysis in Judge  
3 Pratt's order certifying the class versus  
4 the order decertifying the class, when she  
5 certified our class, she walked through  
6 the elements and said specifically on  
7 commonality, "the central common question  
8 whether the floor plan agreement allowed  
9 NextGear to charge interest and fees on  
10 money not yet actually loaned will produce  
11 an answer that can lead to resolution of  
12 the claims for the class in one stroke,  
13 quoting Walmart." That's the kind of  
14 analysis that we don't find in the  
15 decertification order. And there's no  
16 explanation for how we go from commonality  
17 to, 6 months later, no commonality on the  
18 same record.

19 In the first order certifying the  
20 class, on predominance, Judge Pratt wrote:  
21 "Given the specific nature of the  
22 Plaintiff's breach of contract claim in  
23 this case, the elements of this claim are  
24 capable of proof at trial through evidence  
25 that is common to the class rather than

1 individual to its members." And if you  
2 listened carefully to the answer to your  
3 question, Chief Judge Wood, NextGear's not  
4 claiming that 7,000 people would have one  
5 interpretation and 13 another. They want  
6 the same interpretation of the language  
7 across the class. That's why this is a  
8 class case.

9 And the language of the contract does  
10 not allow them to charge interest earlier  
11 than when funds are advanced. And  
12 advanced is defined in the contract as any  
13 loan or payment in any amount made  
14 pursuant to this note by DSC to dealer or  
15 on dealer's behalf to a third party.  
16 They're charging interest and fees before  
17 they make payments. And their definition  
18 of advance does not allow them to do that.  
19 That's why we're here on this case.

20 NextGear is the largest automotive  
21 financing company in the country, and it  
22 imposed its form contract on the dealers  
23 on a take it or leave it basis. NextGear  
24 allowed the terms of the contract to be  
25 revised for individual dealers in fewer

1 than 10 out of 20,000 contracts during the  
2 class period. Although they paint this  
3 relationship as between equally  
4 sophisticated businesses, it bears many of  
5 the relationship hallmarks of a credit  
6 card application, as testified to by their  
7 own general counsel.

8 We ask that this case be remanded,  
9 and that our class be reinstated for trial  
10 on the breach of contract claim. Thank  
11 you.

12 JUDGE WOOD: All right, thank you very  
13 much. Thanks to both counsel. We will  
14 take the case under advisement.  
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REPORTER'S CERTIFICATE

This certification is valid only for a transcript accompanied by my original signature and original seal on this page.

I, ANNA C. COATES, CCR, RPR, do hereby certify this AUDIO RECORDING REGARDING RED BARN vs. NEXTGEAR, upon authority of R.S. 37:2554, above set forth in the foregoing 35 pages; that this audio recording was reported by me in the stenotype reporting method, was prepared and transcribed by me and is a true and correct transcript to the best of my ability; that the transcript has been prepared in compliance with transcript format guidelines required by rules of the board; that I have acted in compliance with the prohibition on contractual relationships, as defined by Louisiana Code of Civil Procedure Article 1434 and in rules and advisory opinions of the board; that I am not related to counsel or the parties hereto, nor am I otherwise interested in the outcome of this matter.

DATE

ANNA C. COATES, RPR, CCR  
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